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Before the
Federal Communications Commission
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

In the Matter of	)	
	)	
	)	
Review of the Commission's Regulations	)	
Governing Television Broadcasting	)	MM Docket No. 91-221
	)	
Television Satellite Stations	)	
Review of Policy and Rules	)	MM Docket No. 87-7

To: The Commission

COMMENTS OF KENTUCKIANA BROADCASTING, INC.

ERRATA

Kentuckiana Broadcasting, Inc., by its attorney, hereby submits an Errata to the "Comments of Kentuckiana Broadcasting, Inc." ("Comments'") filed on February 7, 1997. Due to a work-processing error, an early version of the Comments inadvertently were filed with the Commission. Attached hereto as Attachment 1 is a corrected version of the Comments.

WHEREFORE, it respectfully is requested that these comments be accepted.

Respectfully requested,

KENTUCKIANA BROADCASTING, INC.

By: ______________________
Dan J. Alpert

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February 10, 1997

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ATTACHMENT 1

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To: The Commission

COMMENTS OF KENTUCKIANA BROADCASTING, INC.

Kentuckiana Broadcasting, Inc., by its attorney, hereby submits its comments with regard to the above-referenced rule making proceeding. With respect thereto, the following is stated:

1. The FCC's multiple local ownership rules, in both radio and television, initially were adopted decades ago, and were put in to place with the express intention of promoting competition in the economic marketplace and the diversity of viewpoints and ideas. See, generally, Review of the Commission's Regulations Governing Television Broadcasting, 60 Fed. Reg. 6490 ¶¶ 2-5 (1995). In recent years, the FCC has generally undertaken an explosive loosening of its ownership rules, thereby allowing a large ownership reorientation in certain markets. In radio, this has resulted, in certain cases, situations whereby instead of there being robust competition in certain markets, whereby, *e.g.*, there previously were fourteen or more competitors in a market, instead there may be as few as two or three, following the consolidations that the FCC allowed. *See*, , *e.g.* Orlando, Florida (competition at 14 pre-rules revision, now there essentially are only three competitors).

2. There is a general perception that the Telecommunications Act and the resulting Commission rules allowed too great a reduction in the ownership restrictions too quickly, and that there has been both economic harm, and damage to the diversity of ideas. Moreover, as a direct result of the revision of the regulations permitting increased radio ownership, the Justice Department has found it necessary to step up its oversight of the industry and to conduct investigations. Despite the availability of other audio media (*e.g.*, tapes, CDs, cable radio, etc.), Justice has treated local radio as a separate advertising market. Following recent investigations, Justice has indicated that it will allow companies to control, at most, 40% of the local radio revenue, and may require at least four competitors in any given market. *See, e.g.*, Broadcasting Magazine, November 25, 1996, "Justice's Multifaceted Law of Competition"; Broadcasting Magazine, October 28, 1996, "Justice Tells ARS to Sell Station"; The M Street Journal, December 11, 1996, "Department of Justice Acts in the Broadcasting Industry". The risk of destructive deregulation occurring in the television industry is even greater. While there are 10276 commercial radio stations nationwide, due to the nature of the industry and the wide area that television stations generally cover, there are only 1190 commercial television stations nationwide. "Broadcast Station Totals as of December 31, 1996", rel. Jan. 21, 1997. Thus, in many markets, there *already* is much less direct local competition than ever existed in radio.

3. There exist absolutely no reason for the Commission to allow for the same sort of overblown reorganization to occur in television as is occurring in radio. Rather, the correct approach to be taken with regard to deregulation, if any, is a *moderate* relaxation of the rules, to allow the ownership of *nearby* stations, but not additional stations in the same market. Perhaps one day, once the FCC is able to assess the effects of such an initial

relaxation, further deregulation and relaxation may be possible, but any sudden, complete, relaxation of the duopoly rules should be avoided at this time.

Local Ownership Limitations

4. Kentuckiana Broadcasting nevertheless supports the Commission's proposal to *relax* the current local ownership rules, and permit the local ownership of two television stations in those cases where there would be no overlap of Grade A signals. Moreover, the Commission's proposal to further police the inordinate acquisition of market strength in the television marketplace through requiring that the two stations be assigned to separate DMAs also appears to have merit. DMAs, like their predecessor, ADIs, provide a strong indication of the economic market in which a given station operates. To the extent that the purpose underlying the local television ownership rules was, in part, to ensure the diversity of viewpoints and to promote economic competition in the marketplace, ensuring *not only* that stations' Grade A contours do not overlap *but also* that the stations are located in different economic markets allows for relaxation of local rules to occur through a "fine-tuning" of the ownership restrictions, while still allowing for the basic principles underlying the rule to be protected.

5. The same opinion holds with regard to certain exceptions that the Commission has proposed to the basic duopoly rule, *i.e.*, allowing for a second station to be owned in a DMA where the second station was a "failed station" that had been in bankruptcy or otherwise has had a proven record of not being able to survive as a stand-alone facility. In such cases, it would appear that it would be in the public interest to devise a means by which such a silent station could begin or resume operations -- a station that is silent does not add to competition, and thus, providing *some* service to the public, even if the "voice" is duplicative

with another owner's, is superior than the alternative of there being *no* additional service, at all. However, controls must be put into place to ensure that exceptions cannot be manipulated to create the mere *appearance* that a station is a failed station in order to improperly qualify for such an exception. One such control would be to require a station seeking a waiver of the duopoly rule under this criteria to prove that waiver of the rule is *necessary*, and therefore that there are no alternative purchasers available that are willing to purchase the station that would not require a waiver of the rule. Accord, WAIT Radio, Inc., 418 F.2d 1153, 1156-57 (D.C. Cir. 1969) (every waiver request places a burden, a "high hurdle," on the applicant to show, in a clear, particularized, and factually grounded manner -- that he is unable to meet the strict terms of the rule, and that it would be in the public interest to grant the waiver, and that such a waiver would not undermine the policy embodied by the rule). In this way, competition can be certain to exist in those markets where owners are willing to compete.

6. With respect to the problems that may occur where there are "large DMAs" (NPRM ¶ 27), the Commission should be free to determine whether there should be essentially a "DMA modification" similar to that which already occurs in the cable television arena with respect to the scope of must-carry rights. Under the cable television rules, television stations only are afforded "must-carry" rights within their Area of Dominant Influence" their ADIs. Recognizing that the "ADI" as determined by Arbitron may not necessarily be an accurate indicator of the true "market" of an individual station, Congress has mandated that the FCC consider "ADI modifications" when requested by petitioners. 47 U.S.C. §534(h)(1)(C)(ii). Similarly, in cases where a "DMA" is not a true indication of the precise market areas to which two stations provide service, the Commission should leave itself free to consider market realities, and permit co-ownership of stations, despite their

technical presence in the "same DMA" (as initially determined by Nielsen) in instances where persuasive showings similar to those presented for "ADI modifications" are presented.

7. Kentuckiana Broadcasting firmly opposes a blanket exception to the duopoly rule to simply allow for the co-ownership of a VHF-UHF combo, or else two UHF stations in the same market. Just as the Commission recognizes that a Grade B restriction was overly restrictive and that it should look at economic realities and possibly "fine-tune" its rule by allowing for up-to Grade A ownership, similarly, it should not upset that balance by treating all markets the same with respect to the status of UHF stations. There is no doubt, in large markets currently the dominant stations are assigned VHF frequencies, and there often are UHF stations that are struggling and are on the verge of falling into the category of "failed stations." Both the resurgence of the mandatory carriage rule, and the commencement of additional television networks, however, has essentially "saved" even many of those stations. As noted above, in the event those UHF stations ever qualify as "failed stations" and there are no alternative buyers, since having some service on the frequency is better than having no service, there would be no harm in, for example, a UHF station owning the failing UHF station, or even a VHF station owning the failing UHF station.

8. However, in many markets there is no true "UHF disadvantage" insofar as most or all stations already are UHF stations. For example, in the Louisville, Kentucky market, only two of the eleven stations in the market are on VHF frequencies. In such markets, the "negative perception" of UHF service virtually does not exist or else has not ever become ingrained to the extent it has in large metropolitan markets, and in such markets, the effect of owning two *UHF* stations would be almost identical to the alleged adverse effect of owning two *VHF* stations in other larger markets.

9. Moreover, allowing blanket co-ownership, based simply on "existing" channel ownership and positioning, would be especially inappropriate at this time. As the Commission is aware, the FCC currently is in the process of assigning new channels of operation to existing broadcasters. Under one proposal, *all* stations will eventually become "UHF stations." Under another proposal, some stations (although not necessarily the ones already holding VHF frequencies) will remain on the UHF band. Also, depending upon what course the FCC decides to take, even in the event the FCC decides to continue to allow some VHF operations to remain, the possibility also exist that the FCC will essentially eliminate much of the distinction that would otherwise has existed between UHF and VHF not only by equalizing coverage areas, but also initiating new channel designations for DTV channels that do not in any way relate to their location on the "VHF" or "UHF" bands.

10. Thus, to initiate a blanket policy of allowing "all" UHF/UHF or VHF/UHF combinations to exist would be overbroad by not taking cognizance of specific relationships that exist with regard to public acceptance and market power that exist within each *particular* market, it also would result in the Commission making ownership decisions based upon essentially a "moving target" whereby it will not be known whether a given "VHF" station will *remain* a "VHF" station in the future, and thus be equitably ineligible to qualify for a waiver for the long-term future. Moreover, if *all* stations are eventually going to become UHF stations, allowing for UHF/UHF station co-ownership now would defeat the perceived purpose and necessity of establishing a "Grade A/different DMA" rule, namely, the preservation of competition and increasing the number of competing voices.

11. As indicated above, the far better approach is that suggested by the Commission, namely "this issue is better addressed by looking at [UHF disadvantages]...directly as part of

a case-by-case waiver analysis rather than as part of a general UHF-based exception to the rule." NPRM ¶ 34. The scope and degree of "UHF disadvantages" necessitating exceptions to a general rule differ in different markets, and again, as noted above, it is well established that as a general rule, "waivers" to a general rule should not be granted except in instances where it is impossible to comply with the general rule. WAIT Radio, Inc., 418 F.2d 1153, 1156-57 (D.C. Cir. 1969). In light of the fact that all markets are not "cookie-cutter" identical, and the general "flux" that is about to occur with respect to channel positioning, basing ownership decisions merely on a "general" perception of the difficulties and disadvantages of running a UHF station or upon "current" channel positions that are due to change, would be arbitrary and capricious.

Local Marketing Agreements

12. Kentuckiana Broadcasting is licensee of Station WFTE, Salem, Indiana, and operates under a local marketing agreement with Independence Television Company, licensee of Station WDRB. Under the terms of the Brokerage Agreement, Kentuckiana Broadcasting continues to own and operate Station WFTE, Salem Indiana, maintains it own personnel, and broadcasts some of its own programming. It owner, James T. Ledford, resides in Salem (the community of license) and ensures that the station continues to have strong ties to Salem.

13. To facilitate the commencement of operations, Kentuckiana Broadcasting entered into the brokerage agreement with Independence for an initial seven year term, with options being given on the part of Independence to renew for additional five year terms. This arrangement has allowed for significant public interest benefits to mutually flow from both parties -- Independent's assistance allowed for earlier commencement of operations by WFTE and for access to Independent's programming and operational expertise, all while maintaining

local ownership local ties to the community on the part of James T. Ledford favored by the Commission as a part of its previous comparative hearing process, and has allowed Independence an outlet for its excess sports and other entertainment programming that may otherwise have laid nascent and unavailable to the public absent the relationship with Kentuckiana Broadcasting.[1]

14. Under one proposal being considered by the Commission in this proceeding, the Commission's is proposing both to attribute station participation through an LMA in an manner similar to that as radio and to apply whatever local multiple ownership rules that may be adopted to such relationships, and to grandfather existing television LMA relationships. To the extent this proposal may require Independence Television and Kentuckiana Broadcasting to sever its working relationship, Kentuckiana Broadcasting opposes this proposal. Both Independence Television and Kentuckiana Broadcasting negotiated and entered into the brokerage agreement after assessing the benefits and detriments that would accrue, and determined that it was in the best interest of both parties, <u>and</u> the station, to ensure that a long-term relationship could be created. In this way, Independence Television has time to take full advantage of its investment, while Kentuckiana Broadcasting is able to ensure that there is no disruption to its service through the any sudden unavailability of programming that it has been able to broadcast in the past.

15. That balance clearly will be upset in the event the Commission does not allow

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[1] Specifically, as a result of being able to finally initiate operations, the WFTE broadcast area was able to for the first time such programming as Indiana University basketball, Men's and Women's Indiana State High School basketball playoff games, and daily Hoosier Lottery and Hoosier Millionaire's lottery information for the State of Indiana; and is able to receive information concerning school closing and schedule changes as occur when there is inclement weather. WFTE has broadcast a Salem Town Meeting and promotes the Salem Town Festival, and Kentuckiana Broadcasting is a Member of the Salem JCs, the Southern Indiana Chamber of Commerce, and the Washington County Economic Growth Partnership.

parties to enjoy the full benefit of their negotiated arrangement, including the freedom to exercise of whatever terms for renewal of brokerage agreements as already existed prior to the adoption date of the NPRM. Moreover, this would clearly be consistent with Congressional intent, insofar as the Commission noted, the Conference Report states:

> [Section 202(g)] grandfathers LMAs currently in existence upon enactment of this legislation and allows LMAs in the future, consistent with the Commission's rules. The conferees note the positive contributions of television LMAs and this subsection assures that this legislation does not deprive the public of the benefits of existing LMAs that were otherwise in compliance with Commission regulations on the date of enactment.

Conference Report at 164. To limit LMAs in the manner being considered by the Commission, e.g., their current term, or a maximum of three years (NPRM ¶ 91), would surely eventually "deprive the public of the benefits of existing LMAs that were otherwise in compliance with Commission regulations on the date of enactment" in a manner not intended by Congress.

16. The better approach is that alluded to at Paragraph 85 of the NPRM, namely that "existing television LMAs entered into on reliance of the Commission's current policy should not be disrupted during the remainder of the current contract term." NPRM ¶ 85. If the "current contract" already permits renewals of the LMA, that right should be preserved. However, if the Commission finds it necessary, parties should not have the right to enter into new contracts which *for the first time* would give a party a right to renew an LMA, if such right did not exist prior to the adoption date of the NPRM.

Conclusion

17. The trend for allowing media concentration has not led to clearly better results in the past. Local television remains one of the most scarce resources available. Taking any

action beyond the Commission's basic approach of allowing only a partial relaxation of the local ownership rules will run the risk of making eliminating competition, reducing localism, and allowing only an even more limited number of players to control a discreet economic market.

18. In contrast, LMAs in the past have resulted in the enjoyment of certain economic efficiencies, while at the same time ensuring that the two stations remain as two separate "voices," with neither station gaining inordinate or unfair control in the market, thanks to their separate ownership. Existing LMAs should not be eliminated. They were created to accomplish certain mutual objectives, and benefits still flow to the public as a result of their continued existence.

WHEREFORE, it is respectfully requested that these Comments be considered in conjunction with the matter being reviewed in this proceeding.

Respectfully requested,

KENTUCKIANA BROADCASTING, INC.

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